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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MIKE LENK, Plaintiff and Respondent, v. TOTAL-WESTERN, INC., Defendant and Appellant.	F032238 (Super. Ct. No. 234291) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

Thomas Anton & Associates and Thomas J. Anton for Defendant and Appellant.

Law Offices of John C. Hall and John C. Hall, Law Office of David L. Saine and David L. Saine, for Plaintiff and Respondent.

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Plaintiff and respondent Mike Lenk (Lenk) filed suit against his former employer, defendant and appellant Total-Western, Inc. (TWI), for breach of contract and fraud. In a bifurcated trial, the jury found in favor of Lenk and awarded him $210,320 in compensatory damages, $50,000 in emotional distress damages and $1 million in punitive damages.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Parts I-B, II-A-2, II-A-4, and II-C.

In the unpublished portion of this opinion, we reverse that part of the judgment awarding Lenk $210,320 in compensatory damages. We also reverse the punitive damages award, and remand the case for a new trial on those issues. In the published portion of this opinion, we determine the language in an employment agreement relating to a performance review after one year does not constitute a term of employment. We also find that emotional distress damages arising from a claim of fraud in inducing employment are not barred by the workers' compensation exclusivity doctrine.

I. PROCEDURAL AND FACTUAL HISTORIES

A. Liability phase

In 1990, ARB Inc. (ARB), a general contractor with several divisions in the construction industry, hired Lenk as a purchasing agent in its Bakersfield, California office. In September 1995, ARB moved its headquarters from Bakersfield to Paramount, California, and promoted Lenk to corporate purchasing agent in the new office. Lenk was provided with a salary increase from $40,000 per year to $65,000 per year, approximately $10,000 of which represented compensation for the higher cost of living in the Los Angeles area. Following his promotion, Lenk continued to maintain his residence in Bakersfield. He utilized ARB corporate housing in La Palma for the first four months while looking for housing in the Los Angeles area, but was unable to find any appealing or affordable housing. Beginning in February 1996, Lenk commuted to work from Bakersfield or stayed in a motel in Los Angeles at his expense.

TWI, also headquartered in Paramount, was in the business of industrial contracting. During 1996, the company was actively searching for a purchasing agent. In May 1996, George Gray, a salesman for TWI and a former coworker of Lenk at ARB, saw Lenk at a social function. Lenk informed Gray of his new position at ARB. He did not tell Gray he was looking for a job. Gray expressed to Clarence Edens, Jr., the vice president of TWI's Bakersfield office, that he felt Lenk was frustrated with having to

travel between Bakersfield and Paramount and he believed there was an opportunity to recruit Lenk for the purchasing agent position at TWI. Edens instructed Gray to have Lenk forward his resume. After two subsequent calls from Gray, Lenk eventually forwarded his resume to TWI.

In a June 4, 1996, memorandum to Donald Grimes, the president of TWI from 1995 through 1998, Edens advised:

> "When making my original budget projections for this year, I grossly under estimated the total effort that would be required to turn our financial position around. An existing extreme financial position, an extreme negative business and professional image and an almost non-existent sales effort was just the tip of the iceberg. Add to these no employee morale and an aging decrepit equipment fleet and you begin to get an idea of the hole that we were in. [¶] … [¶]
>
> "We will continue to revamp our purchasing department and [its] procedures[;] this must become an automated computerized effort. Our 'Inventory by Consignment' effort for consumable and expendables is almost complete. Detailed invoice review continues to clean up the system and eliminate costly errors. Timely and accurate job cost tracking and reporting continues to be a significant problem. Our tracking is accomplished off-line and is a duplicative effort that is very tedious and expensive. Our current corporate computer accounting system will not support us in this area and there should be a sense of urgency in correcting this problem."

On June 9, 1996, Edens contacted Lenk and requested an interview with him. Lenk told Edens he was not looking for a job, but Edens replied, "'It never hurts to talk.'" Lenk agreed to meet with Edens the following day. According to Lenk, he explained to Edens he had a secure position at ARB and had recently been promoted to the corporate level. In response, Lenk testified Edens represented that TWI planned to move its corporate headquarters to Bakersfield and Lenk would be first in line for a corporate purchasing position with TWI. Edens provided Lenk with information concerning TWI's benefits and told him to call if he was interested. The two men exchanged several more calls. On July 5, 1996, Lenk telephoned Edens after reading a newspaper article about

TWI that indicated it was a $40-million company and a subsidiary of a $200-million, family-owned conglomerate, Bragg Investment Company. The article quoted Edens. Edens told Lenk he intended to formulate a written offer and deliver it to him the following Monday.

Grimes estimated that in June 1996, TWI's annual revenues were approximately $30 million. Grimes questioned Edens about the July 1996 article, as he did not know the size of Bragg Investment Company and believed Edens would not have known the size either. Grimes never received a satisfactory answer as to where Edens obtained the revenue figures for TWI or Bragg Investment Company that were set forth in the article. Grimes never inquired whether Edens had communicated this information to any job applicants.

On July 8, 1996, Edens delivered TWI's written employment offer to Lenk. The offer stated, in pertinent part:

> "After meeting with and discussing the possibility of you becoming a part of the Bakersfield [TWI] Team, I am excited about what you can contribute to our effort and the opportunities we can offer you.
>
> "As a key member of our staff you will have the opportunity to turn our purchasing activity into a[] well organized effort and implement some [ideas] that you have developed yet not had the opportunities to see bear fruit and bring results. And while this is a staff position in the Bakersfield office I certainly think advancement to the corporate level is a distinct possibility. [¶] … [¶]
>
> "I would like to propose the following to you:
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> | | |
> |---|---|
> | "Position Title: | Purchasing Agent |
> | "Reporting Responsibilities: | [TWI]/Bakersfield, CA
Reports to [] Edens - Vice President |
> | "Salary: | $55,000.00 Annually |
> | "Performance Review: | To be completed after
Twelve (12) month's employment |

"Fringe Benefits:	Vacation: Two (2) weeks after one (1) year, Three (3) weeks after Five (5) years
	Holidays: Nine (9) paid holidays per year"

On July 10, 1996, Lenk submitted a letter of resignation to ARB and accepted TWI's offer of employment. Lenk testified that, in accepting the position with TWI, he relied on the representations made to him by Edens and the written employment offer. Lenk entered into a written employment agreement with TWI that provided, in relevant part:

"Salary:	$55,000.00
"Performance Review:	To be completed after twelve (12) months employment
"Fringe Benefits:	Vacation: Two (2) weeks after one (1) year, three (3) weeks after five (5) years
	Holidays: Nine (9) paid holidays per year [¶] … [¶]
"Position Title:	Purchasing Agent
"Reporting Responsibility:	[TWI]/Bakersfield, California Reports to [] Edens - Vice President
"Reporting Date:	August 1, 1996

"I have read and acknowledge agreement to these terms and conditions."

The employment agreement, signed by Lenk and Edens, did not state that Lenk's employment was for any specific term. Lenk testified that he understood the language regarding the performance review to give him a minimum one-year term of employment. He believed he was committing his services for a minimum of 12 months. However, he acknowledged that no one at TWI ever told him so. In addition, no one at TWI ever told Lenk he could not be terminated except for good cause. Lenk believed he could be terminated after one year.

In July 1996, TWI's Bakersfield office had a net loss of approximately $540,000. Grimes estimated that during the 1996-1997 fiscal year, that office suffered a net loss between $1 million and $1.5 million.

On August 1, 1996, Lenk commenced his employment with TWI. He signed an employment application that stated: "I agree that my employment may be terminated by [TWI] at any time without liability for any additional compensation, wages or salary except such as may have been earned at the date of such termination.… I understand and agree if I am employed, such employment is for no defin[i]te period of time …." Lenk was also provided with a copy of TWI's personnel manual and acknowledged reading and signing it. That manual provided:

> "EMPLOYMENT AT WILL
>
> "Your continuous employment depends on many factors beyond our control. Because of this we are an 'At Will Employer'. Carefully review the statement below. You will be asked to sign a copy of it at the back of this handbook. If you have any questions, contact the Director of Safety and Personnel before you accept employment.
>
> "'*I understand that nothing contained in the employment application or conveyed during any interview intended to create an employment contract between me and the Company. In addition, I understand and agree, my employment is for no definite or determinable period and may be terminated at any time, with or without prior notice, at the option of either myself or the Company, and that no promises or representations contrary to the foregoing are binding on the Company unless made in writing and signed by me and the Company's designated representative.*'"

Lenk did not object to signing either the employment application or acknowledgment of the personnel manual. Lenk testified that he knew he was an at-will employee, but he had an employment contract signed by him and a company representative.

Lenk replaced Gerald Powell, because Powell had no computer experience. Powell was transferred to TWI's tool room, and TWI offered to pay Powell's tuition for computer training classes. Powell enrolled in a 12-week computer course, twice a week

after work. Lenk's annual salary was double Powell's salary. As a purchasing agent, Lenk made cost estimates, obtained material prices and purchased items needed in the company's operations. During his employment, Lenk also implemented an existing computerized program at TWI in the purchasing department of TWI's Bakersfield office. Prior to Lenk's employment there was no computerization in that purchasing department.

On January 31, 1997, six months after he had started working for TWI, Lenk was terminated. Grimes advised Lenk he was being terminated for "economic reasons," but gave no other explanation. Grimes testified that a number of employees were laid off based on a downturn in business conditions, including the loss of a large contract with Chevron. Grimes did not consult with Edens prior to terminating Lenk. Lenk was provided with two weeks of severance pay.

In March 1997, Lenk was hired by a friend's company to make sales calls, and was paid on commission, earning approximately $2,300 per month. On May 1, 1997, Airpol Construction, Inc., hired Lenk as its purchasing agent, at an initial salary of $15.80 per hour. In September 1997, his pay was increased to $16.79 per hour. Lenk typically worked 10-hour days, longer working hours than he had at TWI, with fewer benefits. In 1998, Lenk's annual salary was approximately $47,800.

Lenk testified that he relied upon the representations made by Edens as to TWI's financial condition and Lenk's future with the company, and he would not have left his position at ARB had he known the truth. On July 14, 1997, Lenk filed suit against TWI alleging three causes of action: 1) fraud, 2) false representations to induce relocation in violation of Labor Code section 970, and 3) breach of contract.

In October 1997, Edens left TWI for a competing company. TWI accused Edens of improperly recruiting TWI employees for his new employer and making false statements to TWI's customers. Powell was ultimately returned to his previous position of purchasing agent in TWI's Bakersfield office.

A jury trial began on September 16, 1998. The jury found in favor of Lenk on his claims for "breach of contract, fraud--intentional misrepresentation, fraud--negligent misrepresentation, and fraud--concealment." The jury rejected Lenk's claim for fraud based on false promise. Lenk was awarded $210,320 in compensatory damages for lost past and/or future wages and benefits and $50,000 in emotional distress damages, for a total of $260,320. The jury also found Lenk proved, by clear and convincing evidence, that the conduct of TWI was fraudulent.

B. Punitive damage phase*

In the punitive damages phase of the trial, George Bragg, corporate president of TWI since 1988, testified that the company has two equal shareholders, his sister Maryann Pool and him. Bragg testified that Bragg Investment Company, a sister company to TWI, had advanced TWI $3,857,115. In addition, Bragg and Pool individually advanced TWI $2,996,816. No terms relating to interest rates or repayment dates were identified for the advances. According to Bragg, repayment would be made when TWI was able. Bragg insisted these advances were loans to the corporation for capital, not equity. The advances were listed on the 1997 corporate balance sheet as liabilities rather than equity. Bragg testified that in the past six months, TWI had repaid $1.5 million of the loans to either Bragg Investment Company or him. For the year ending September 30, 1997, TWI's gross contract revenues totaled $41,567,078. The company's current assets totaled approximately $10,870,000.

Jerry Randall, a certified public account, testified that he reviewed TWI's financial statements for the fiscal year ending September 30, 1997. The company had current assets of $10,870,000 and current liabilities of $3,870,000, leaving $7 million of excess current assets over current liabilities. Randall noted it was significant that the advances

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* See footnote *, *ante*.

from Bragg Investment Company and Bragg and Pool were listed on TWI's balance sheet as subordinated advances, with no repayment terms and no interest. As a result, Randall opined the advances had a "close association" to actual capital and could be reclassified as equity or part of the worth of the company. Randall explained that he examines a company's ratio of current assets to current liabilities to determine its financial health. A ratio of two to one suggests financial health, i.e., there is adequate capital for the company to pay its current obligations. TWI had a ratio of nearly three to one.

Paul Conrad, the current president of TWI and the person designated as the most knowledgeable on TWI's financial condition, testified that in late 1997, TWI repaid $1.5 million of subordinated debt, a fact not reflected on the financial statement for the fiscal year ending September 30, 1997. Conrad also testified that the stockholders provided $7,933,692 of "paid-in capital," an investment in the corporation which TWI was not obligated to repay. However, the stockholders and a related company loaned TWI $6,853,931, which TWI was obligated to repay. Conrad opined that the net worth of TWI was $1,387,149, calculated as the difference between TWI's total assets and total liabilities for the year ending September 30, 1997.

The jury awarded Lenk $1 million in punitive damages. TWI filed motions for a new trial and for judgment notwithstanding the verdict. The trial court denied the motion for judgment notwithstanding the verdict and the motion for a new trial on the compensatory damages phase. However, the court granted the new trial motion on the punitive damages phase, conditioned on Lenk's acceptance of a remittitur reducing the punitive damages award to $520,000. Lenk accepted the remittitur.[1]

TWI timely filed its notice of appeal.

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[1] Lenk filed a separate appeal from the court's remittitur of the punitive damages award. (See case no. F032677.)

II. DISCUSSION

A. Sufficiency of the evidence

TWI contends there is insufficient evidence in the record to support 1) judgment on the fraud claim, 2) judgment on the breach of contract claim, and 3) the economic damages award. We find sufficient evidence to support judgment on the fraud claim. However, we agree with TWI's latter two contentions.

1. Standard of review

A challenge in an appellate court to the sufficiency of the evidence is reviewed under the substantial evidence rule. (See *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; *Alderson v. Alderson* (1986) 180 Cal.App.3d 450, 465 [substantial evidence standard applies to appeals from both jury and nonjury trials].)

> "'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that … the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' [Citation.]" (*Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1166; see also *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Moreover, we defer to the trier of fact on issues of credibility. (*Oldham v. Kizer* (1991) 235 Cal.App.3d 1046, 1065.)

> "[N]either conflicts in the evidence nor '"testimony which is subject to justifiable suspicion … justif[ies] the reversal of a judgment, for it is the exclusive province of the [trier of fact] to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.'" [Citations.] Testimony may be rejected only when it is inherently improbable or incredible, i.e., '"unbelievable *per se*,"' physically impossible or '"wholly unacceptable to reasonable minds."' [Citations.]" (*Ibid.*)

2. Fraud claim[*]

TWI argues there is insufficient evidence to support judgment on the fraud claim because 1) Edens' statements were either too vague to be actionable or were not false, 2) an employer owes no duty to disclose information that does not directly bear on any offer of employment, and 3) Labor Code section 970 does not apply because Lenk admitted he did not relocate his residence. We find TWI's argument to be without merit.

Conduct may be fraudulent because of an intentional misrepresentation, a negligent misrepresentation, concealment, or a false promise. (BAJI No. 12.30; see also *Hart v. Browne* (1980) 103 Cal.App.3d 947, 957.) "'The necessary elements of fraud are: (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage.' [Citations.]" (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239; see also BAJI Nos. 12.31 [fraud by intentional misrepresentation], 12.35 [fraud by concealment], 12.40 [fraud by false promise], 12.45 [fraud by negligent misrepresentation].) The jury found in favor of Lenk on his fraud claim based on three independent theories: intentional misrepresentation, negligent misrepresentation and concealment.

An actionable misrepresentation of fact consists of "any … conduct that amounts to an assertion not in accordance with the truth." (Rest.2d Torts, § 525, com. b, p. 56.) "Thus, words or conduct asserting the existence of a fact constitute a misrepresentation if the fact does not exist." (*Ibid.*) In addition, " '[w]herever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact and rely and act upon it as such, then the statement

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[*] See footnote *, *ante*.

clearly becomes an affirmation of fact ….' " (*Crandall v. Parks* (1908) 152 Cal. 772, 776.)

Predictions as to future events are normally regarded as nonactionable expressions of opinion. However, "such statements will not preclude relief on the ground of fraud if they were intended and accepted as representations of fact and involved matters peculiarly within the speaker's knowledge [citation]." (*Eade v. Reich* (1932) 120 Cal.App. 32, 35; accord *H. W. Smith, Inc. v. Swenson* (1930) 105 Cal.App. 60, 64.) Thus, actionable conduct may include, in appropriate circumstances, a statement about the future, even if promissory in form, if it implies a representation concerning an existing or past fact. (Rest.2d Torts, § 525, com. e and f, p. 57.) For example, a statement in the form of a prediction regarding the future course of events may justifiably be interpreted by the recipient as a statement that the speaker knows of nothing that will make the fulfillment of the prediction impossible or improbable. (Rest.2d Torts, § 525, com. f, p. 57; see also *Dyke v. Zaiser* (1947) 80 Cal.App.2d 639, 652 [representations as to profitability of future business of amusement center with knowledge law enforcement intended to close it constituted fraud]; *Eade v. Reich*, *supra*, 120 Cal.App. at pp. 34-35 [representation by corporate agent that corporation would lease certain property regarded as affirmation of fact]; *H. W. Smith, Inc. v. Swenson*, *supra*, 105 Cal.App. at pp. 63-64 [statement by corporation's agent that there would be large dividend declared was statement of fact, not promissory representation]; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 681, pp. 782-784.)

The determination of whether a particular statement is an expression of opinion or an affirmation of a fact is dependent upon the facts and circumstances existing at the time the statement is made. (*Bedell Engineering Co. v. Rouse* (1943) 57 Cal.App.2d 734, 736.) And "where there is a reasonable doubt as to whether a particular statement is an expression of opinion or the affirmation of a fact, the determination rests with the trier of the facts." (*Id.* at pp. 736-737.)

Where material facts are known to one party and not the other, failure to disclose them is ordinarily not actionable fraud unless there is some relationship between the parties that gives rise to a duty to disclose such known facts. However, active concealment of facts may give rise to a fraud claim, and under certain circumstances, nondisclosure is actionable. (5 Witkin, Summary of Cal. Law, *supra*, Torts, § 697, p. 799; BAJI No. 12.36.)

> "Witkin sets out the four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts." (*Heliotis v. Schuman* (1986) 181 Cal.App.3d 646, 651; see also *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347-348.)

We now turn to TWI's contentions. TWI first claims Edens' statements were too vague to be actionable or were not false. We find this contention meritless. TWI actively recruited Lenk, who had an existing job with ARB. According to Lenk's testimony, he informed Edens he had a secure position with ARB and recently received a promotion to the corporate level. Edens, in turn, represented that TWI planned to move its corporate headquarters to Bakersfield and Lenk would be first in line for a corporate purchasing position with TWI. In addition, Edens and Lenk discussed the financial condition of TWI, specifically that TWI was a $40-million company and a subsidiary of a $200-million, family-owned conglomerate.

We do not find any of these representations to be vague. In addition, there is sufficient evidence that the representations were false. Prior to making the statements to Lenk, Edens had advised Grimes in a written memorandum that he grossly underestimated the total effort required to "turn [TWI's] financial position around." Edens detailed the problems with TWI: "an extreme negative business and professional image and an almost non-existent sales effort … , no employee morale and an aging decrepit equipment fleet …." Edens also stressed the urgency in revamping its

purchasing department, which was not yet computerized and experiencing significant problems in timely and accurate job cost tracking and reporting. Grimes estimated annual revenues for TWI in June 1996 were only $30 million, and the Bakersfield office was experiencing substantial losses--$540,000 for July 1996 and $1 million to $1.5 million for the 1996-1997 fiscal year. Further, although the Bragg family owned TWI, it was not a subsidiary of any $200-million conglomerate. Thus, there is sufficient evidence these representations were false and material, and influenced Lenk's decision to accept employment.

In addition, it was reasonable for the jury to find Edens' statements relating to the predicted move of the corporate office to Bakersfield and Lenk's likely promotion to a corporate purchasing position to be intended and accepted as representations of fact, involving matters peculiarly within Edens' knowledge. It was also reasonable for the jury to find those statements false, since only six months after commencing employment and following his implementation of a computerized program in the purchasing department of TWI's Bakersfield office, Lenk was terminated for "economic reasons."

The evidence, construed in the light most favorable to the judgment, supports the jury's finding that there were intentional and negligent misrepresentations. (See *Green Trees Enterprises, Inc. v. Palm Springs Alpine Estates, Inc.* (1967) 66 Cal.2d 782, 786 ["The misrepresentation of even a single material fact upon which plaintiff had a right to, and did, rely will support the judgment."].) As a result, there is sufficient evidence in the record to support judgment on the fraud claim.

TWI also argues that because "Lenk did not present any evidence to support his misrepresentation or false promise claims … the only common law theory remaining to support his judgment is fraudulent concealment." TWI then proceeds to argue it owed no duty to disclose information related to its financial condition. We need not address TWI's argument in light of our finding of sufficient evidence of fraud by intentional and

negligent misrepresentation. Nor do we need to address TWI's remaining contention that Labor Code section 970 does not apply and cannot support judgment on the fraud claim.

We note, however, that although the complaint identifies false representations to induce relocation in violation of Labor Code section 970 as a separate cause of action, the jury made no specific findings on this claim. There is no evidence in the record that Lenk changed his residence. Thus, the Labor Code section 970 claim has no merit. (See *Collins v. Rocha* (1972) 7 Cal.3d 232, 239-240; *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1392.)

3. Breach of contract claim

Based on our finding of sufficient evidence to support the fraud claim, it would normally not be necessary to address whether there is insufficient evidence to support the breach of contract claim. (See *Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1291-1292 [where several counts or causes of action, general verdict will stand if evidence supports it on any one specific count]; *Barragan v. Banco BCH* (1986) 188 Cal.App.3d 283, 304 [appellate court has power to disregard particular cause of action in order to affirm judgment on any theory supported by the evidence].) However, since this case is being remanded, we address TWI's contention regarding the breach of contract cause of action. We conclude as a matter of law that the evidence is insufficient to support judgment on this claim. As a result, on remand, Lenk may only seek damages based on his fraud cause of action.

In California, there is a presumption that employment is "at-will," absent an "express oral or written agreement specifying the length of employment or the grounds for termination." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 677; see also Labor Code, § 2922.) "This presumption may, however, be overcome by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on 'good cause.' [Citations.]" (*Foley, supra,* 47 Cal.3d at p. 677.) While the

absence of an express written or oral agreement concerning the terms of employment creates a presumption it is at will, this conclusion is by no means required.

> "[W]hen the parties have enforceable expectations concerning either the term of employment or the grounds or manner of termination, Labor Code section 2922 does not diminish the force of such contractual or legal obligations. The presumption that an employment relationship of indefinite duration is intended to be terminable at will is therefore 'subject, like any presumption, to contrary evidence.…' [Citation.]" (*Id.* at p. 680, fn. omitted; see also *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 336 [contractual understanding need not be express, but may be implied in fact, arising from parties' conduct evidencing their actual mutual intent to create enforceable limitations].)

The record simply does not support Lenk's contention that he had either an express or implied contract for a minimum one-year term of employment. Lenk's employment agreement sets forth no term of employment. Lenk maintains the language in his written employment agreement relating to a performance review guaranteed him a minimum one-year term of employment. We do not interpret the statement that a performance review is "[t]o be completed after twelve (12) months of employment" to constitute a minimum one-year contract term. (See *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866 [appellate court may independently interpret written contract where no conflicting extrinsic evidence presented].) We find no ambiguity in the employment contract. (See *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554-555 [ambiguity determination in contract is question of law subject to de novo review].) It plainly does not contain any specific term of employment.

In addition, there is no evidence that the parties otherwise agreed Lenk would have a minimum one-year term of employment or would be terminated only for cause. To the contrary, Lenk signed an employment application confirming he was an at-will employee and acknowledged receipt of a personnel manual with an explicit at-will provision. Moreover, Lenk admitted that no one at TWI told him he had a one-year employment contract or that he could be terminated only for cause. His contention now that "Edens

told [him] … he would have his job at TWI for at least a year[]" has absolutely no support in the record. Lenk's "understanding" of the meaning of the performance review provision in the contract is not competent extrinsic evidence. (See *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, fn. 3 [evidence of undisclosed subjective intent of parties irrelevant to determining meaning of contractual language].)

Thus, we find the evidence insufficient to support judgment on the breach of contract claim.

4. Economic damages award*

TWI also contends there is insufficient evidence to support the economic damages award because 1) an employee with a contract for a specified term cannot recover damages for lost wages for a period beyond that term; 2) when an employee is induced to leave a job based on a promise of a one-year contract, his damages are limited to lost wages for one year; 3) the amount awarded is speculative; and 4) the award was not reduced to its present value.

We preliminarily dispense with TWI's first two claims, which only apply to damages based on breach of an employment contract. (See BAJI No. 10.34; *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [measure of recovery by wrongfully discharged employee generally is amount of salary agreed upon for period of service less amount employer proves employee has earned or with reasonable effort could have earned from other employment].) "The distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate 'social policy.' [Citation.]" (*Foley v. Interactive Data Corp., supra,* 47 Cal.3d at p. 683.)

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* See footnote *, *ante*.

Here, we found sufficient evidence to support Lenk's fraud claim. BAJI No. 12.57, with which the jury was instructed, sets forth the applicable damages based on fraud:

> "If you find that plaintiff is entitled to a verdict against the defendant, you must then award plaintiff damages in an amount that will reasonably compensate for all the loss suffered by plaintiff and caused by the fraud upon which you base your finding of liability.
>
> "[The amount of such award shall be the difference between the actual value of that which the plaintiff received and the value which it would have had if the fraudulent representation had been true. This is sometimes referred to as the 'benefit of the bargain.']"

Contrary to TWI's contention, Lenk's fraud damages are not limited to the difference between what he earned during the year after he accepted employment with TWI and what he would have earned if TWI had honored its alleged promise of a one-year term of employment. TWI incorrectly attempts to limit Lenk's damages to a one-year period of time because Lenk admitted he understood he could be terminated after one year. We have found the agreement did not specify any term of employment. Thus Lenk's understanding of his employment agreement is irrelevant. As a result, these factors cannot serve as a basis to limit Lenk's damages to a one-year term of employment. Lenk's fraud claim relates to representations TWI planned to move its corporate headquarters to Bakersfield, had substantial assets and resources and intended to promote Lenk to the corporate level. The claim is not based on an alleged unlawful breach of a one-year employment contract. As a result, Lenk's damages may properly encompass the benefits he would have received under the employment contract beyond one year. (See Civ. Code, §§ 1709, 3333; *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 646 [fraud plaintiffs may recover out-of-pocket damages in addition to benefit-of-the bargain damages]; *Armstrong v. Lassen Lumber & Box Co.* (1928) 204 Cal. 529, 533 [measure of damages for fraud is amount that will compensate for all detriment].)

We now turn to TWI's third and fourth contentions -- that the award is excessive as a matter of law, speculative and not reduced to its present value. Here, we agree with TWI that there is insufficient evidence in the record to support the award.

A jury is not permitted to award a party damages that are speculative. However, a party may recover prospective damages -- losses reasonably certain to occur in the future. (See BAJI No. 14.60; 6 Witkin, Summary of Cal. Law, *supra*, Torts, §§ 1325-1326, pp. 782-784.) "The award for future pecuniary loss must be for the *present cash value* of the loss, i.e., the amount which, if invested at the highest reasonably secure rate of return, will cover the award." (*Id.* at § 1326, p. 784; see also BAJI No. 14.70.)

After reviewing the record, we find it impossible to determine the basis upon which the jury awarded $210,320 in compensatory damages, specifically damages for lost past and/or future wages and benefits. There was no expert testimony on the issue and little discussion of damages during closing arguments. We are left with the general facts presented to the jury. Lenk's salary at TWI was $55,000 per year. His position at ARB paid $65,000 per year. There was a 22 to 30 percent difference in the cost of living between Los Angeles and Bakersfield. At the time of trial, one year and eight months after Lenk's termination, Lenk's annual salary was approximately $47,800, but he was working 10-hour days with fewer benefits, including fewer medical benefits. As a result, Lenk testified his insurance would only cover 10 percent of a $32,000 surgery to correct a disorder in his daughter's jaw.

We cannot discern any way this evidence supports a compensatory damage award of $210,320. The award had to be based on more than Lenk's lost past wages and benefits, and it appears the jury did not reduce any lost future wages and benefits to their present value. BAJI No. 14.70, which defines the meaning of present cash value, was requested by both Lenk and TWI and given to the jury. However, the jury was not given a present value table, and no expert testimony was presented to assist the jury in

calculating damages. We find the comments in *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 876-877, to be particularly relevant:

> "There was … no *evidence* on how to determine the present value of future loss.… Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining … "the present sum of money which … will pay to the plaintiff … the equivalent of his [future economic] loss …"' [Citation.]" (See also *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613-614.)

Here, the jury was placed in the same position. It was instructed on present value of future loss, yet given no tools to assist it in making this determination.[2] To compound matters, the jury was also not instructed with BAJI No. 14.60--speculative damages are not permitted.

Thus, on this record, we find the evidence is insufficient to support the $210,320 in economic damages awarded by the jury. (See *Barrett v. Southern Pac. Co.* (1929) 207 Cal. 154, 166-167 [reversal for excessive damage award]; *Van DerHoof v. Chambon* (1932) 121 Cal.App. 118, 136 [judgment reversed as to amount of damages only, where grossly disproportionate to any reasonable limit of compensation warranted by facts].)

B. Emotional distress damages

TWI contends that Lenk's emotional distress damages are barred by the workers' compensation exclusive remedy rule. We disagree.

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[2] Lenk maintains that TWI has waived its right to argue reversal based on the failure of the jury to reduce lost future wages to their present value because the issue was not raised in the trial court. Specifically, Lenk argues TWI failed to object to BAJI No. 14.70 or the verdict form. Lenk's argument lacks merit. TWI does not maintain the court erred in giving the instruction or formulating the special verdict form. TWI contends Lenk failed to present evidence to adequately support the economic damage award.

Labor Code section 3602[3] provides that the "sole and exclusive remedy" of an injured employee (or the employee's dependents) against an employer is the right to recover workers' compensation benefits, 1) if "the conditions of compensation set forth in [s]ection 3600 concur," and 2) unless an exception specified in sections 3602, 3706 or 4558 applies.

Section 3600 lists a number of conditions that must exist in order for the injured employee to recover workers' compensation benefits from his or her employer. Section 3600 states, in pertinent part:

> "(a) Liability for the compensation provided by this division … shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment … in those cases where the following conditions of compensation concur:
>
> "(1) Where, at the time of the injury, both the employer and the employee are subject to the compensation provisions of this division.
>
> "(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.
>
> "(3) Where the injury is proximately caused by the employment, either with or without negligence."

If any of these conditions does not exist, the employee may bring a civil action against the employer. (§ 3602, subd. (c); see also *Seymour v. Setzer Forest Products, Inc.* (1954) 124 Cal.App.2d 608, 610-611 [employee injured before shift began]; 2 Witkin, Summary of Cal. Law (9th ed. 1987) Workers' Compensation, § 40, pp. 593-594.) "[C]ase law … has greatly expanded the exceptions to the exclusivity rule …." (*Hart v. National Mortgage & Land Co.* (1987) 189 Cal.App.3d 1420, 1427-1428.) However, there is no exception to the exclusive remedy rule simply because an injury suffered on

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3 All statutory references are to the Labor Code unless otherwise indicated.

the job is not compensable under workers' compensation law. (See *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754-756; *Williams v. State Compensation Ins. Fund* (1975) 50 Cal.App.3d 116, 121-123.)

"[W]hen the misconduct attributed to the employer is actions which are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, an employee suffering emotional distress causing disability may not avoid the exclusive remedy provisions of the Labor Code …." (*Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148, 160.) The focus is on whether the conduct complained of was a normal risk of the employment relationship. (*Id.* at pp. 160-161.) Tort recovery for intentional misconduct is permitted where "conduct of an employer [has] a 'questionable' relationship to the employment, an injury which did not occur while the employee was performing service incidental to the employment and which would not be viewed as a risk of the employment, or conduct where the employer … stepped out of [its] proper role[]." (*Id.* at p. 161; see also *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16 [exclusive remedy provisions not applicable to risks not "reasonably encompassed within the compensation bargain"]; *Usher v. American Airlines, Inc.* (1993) 20 Cal.App.4th 1520, 1524 [exceptions to exclusive remedy rule include conduct outside proper role of employer and where employee's injury not viewed as risk of employment, such as injuries to one's reputation]; *Lopez v. Sikkema* (1991) 229 Cal.App.3d 31, 39.)

In addition, an employer's false statements made to induce a person to become an employee may be the basis for a civil lawsuit against the employer. (See *Lazar v. Superior Court*, *supra*, 12 Cal.4th at pp. 639-649 [cause of action for fraudulent inducement of employment contract or promissory fraud stated; tort and punitive damages recoverable]; *Finch v. Brenda Raceway Corp.* (1994) 22 Cal.App.4th 547, 553-554 [substantial evidence supported violation of section 970 where knowingly false representation about projected length of employment].)

Here, we find TWI's conduct, in the form of misrepresentations made to induce Lenk to become an employee, was not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain. (*Shoemaker v. Myers*, *supra*, 52 Cal.3d at p. 16; *Cole v. Fair Oaks Fire Protection Dept.*, *supra*, 43 Cal.3d at pp. 160-161.) In essence, TWI stepped out of its proper role as an employer. The conduct alleged simply does not reflect matters that can be expected to occur with substantial frequency in the working environment. (*Id.* at p. 161; see also *Ramey v. General Petroleum Corp.* (1959) 173 Cal.App.2d 386, 402-403 [fraud claim against employer that conspired with third party to conceal from employee right to sue third party did not arise out of the employment; nor was it proximately caused by the employment].)

TWI relies heavily on *Spratley v. Winchell Donut House, Inc.* (1987) 188 Cal.App.3d 1408, to support assertion that Lenk's emotional distress damages are barred by the exclusivity doctrine. *Spratley* is distinguishable from the case here. In *Spratley*, an employee assaulted by an intruder at her workplace filed suit against her employer for fraudulent inducement to enter into an employment contract. The employee claimed she would not have accepted the job but for the employer's fraudulent representations that it would make the workplace safe. The trial court sustained the employer's demurrer to the complaint without leave to amend. (*Id.* at pp. 1410-1411.) In a two-to-one decision, the appellate court held that workers' compensation is the sole remedy for an employee injured by the employer's failure to provide a safe workplace. The court ruled the employee could not circumvent the exclusive remedy rule merely by alleging that her employer fraudulently misrepresented that extra security was being provided to protect night workers. (*Id.* at pp. 1412-1414; see also *Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal.App.4th 1261, 1263-1266 [tort action for employer's negligent or reckless failure to provide adequate premises security despite knowledge of danger to employees precluded by exclusive remedy provisions of workers' compensation law].)

In contrast, Lenk's fraud claim does not involve a claim of misrepresentation concerning employee safety. Workplace safety is clearly an issue contemplated by the workers' compensation statutory scheme. It is a normal part of the employment relationship and a risk reasonably encompassed within the compensation bargain. On the other hand, misrepresentations related to the financial stability of a company, the company's future plans to relocate its operations, and the job applicant's promotion in the corporate ranks, all designed to induce employment, are not (we hope) a normal part of the employment relationship.

Thus, we find the workers' compensation exclusive remedy rule does not bar Lenk's emotional distress damages.

C. Punitive damages*

TWI finally contends the $520,000 punitive damages award is excessive as a matter of law because 1) it represents 38 percent of TWI's net worth; and 2) when the maximum amount of recoverable compensatory damages is considered ($9,534.62), the ratio of punitive damages to compensatory damages (54 to 1) is excessive. We need not reach the merit of TWI's contentions in light of our decision to reverse Lenk's economic damages award.

The decisions on whether to award punitive damages and the amount of any such award are exclusively the function of the trier of fact. (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602.) "The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Ibid.*) With respect to plaintiff's injury, California follows the rule that punitive damages must bear a reasonable relation to the actual harm suffered. (*Ibid.*; BAJI No. 14.72.2; see also *Adams v. Murakami* (1991) 54 Cal.3d 105, 110.)

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* See footnote *, *ante*.

Here, the jury was instructed that the punitive damages must bear a reasonable relation to the injury, harm or damage actually suffered by plaintiff. As a result, in light of our reversal of that portion of the judgment relating to the economic damage award, we must also reverse the punitive damages award, since we cannot determine whether it is reasonably related to plaintiff's damages. (See *Asgari v. City of Los Angeles* (1997) 15 Cal.4th 744, 761, fn. 15; see also *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 781; *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1254-1255.)

DISPOSITION

The jury's findings on the fraud claim are affirmed, and with respect to the contract cause of action, its findings are vacated. The economic and punitive damages award is reversed. The case is remanded solely to determine the amount, if any, of economic and punitive damages on the remaining fraud claim. Costs are awarded to TWI.

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WISEMAN, J.

WE CONCUR:

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HARRIS, Acting P.J.

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LEVY, J.